IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ABBEY ROAD GROUP, LLC, a Washington limited liability company; KARL J. THUN and VIRGINIA S. THUN, husband and wife; THOMAS PAVOLKA; and VIRGINIA LESLIE REVOCABLE TRUST; and WILLIAM AND LOUISE LESLIE FAMILY REVOCABLE TRUST Petitioners, v. CITY OF BONNEY LAKE, a Washington municipal corporation, Respondent.	)	No. 80878-3 En Banc Filed October 8, 2009

C. JOHNSON, J.—This case asks us to determine whether development rights vest upon filing of a site plan review permit application (site plan application).[1] Under Washington statutory law, development rights vest upon the filing of a complete building permit application, RCW 19.27.095(1).[2] This case

[1] The full title on the application form is "Commercial or Multi-Family Site Plan Review Application Form Type 3 Permit." AR Ex. 27.

involves the question of whether any common law or constitutional due process principles support a different rule. Abbey Road Group, LLC, filed a site plan application for a multifamily condominium development with the city of Bonney Lake (City). The application was denied based on a later adopted zoning change which prohibited this type of development. Abbey Road challenged the denial, first administratively, then in court. The hearing examiner found that Abbey Road's rights did not vest. The superior court reversed the hearing examiner's decision. The City appealed, and the Court of Appeals reversed and held that filing a building permit application is necessary to vest development rights. We affirm the Court of Appeals.

Factual and Procedural History

Abbey Road proposed a 575-unit condominium project on 36.51 acres within the City. Bonney Lake Municipal Code (BLMC) governs development procedures;[3] however, the City has not adopted a vesting ordinance. On June 15, 2005, Abbey Road representatives attended a preapplication meeting with the City. At the meeting, the City distributed a letter generally reviewing the information

[2] The legislature also codified vesting for plat applications. *See* RCW 58.17.033.
[3] *See* Title 14 BLMC. Chapter 14.50 governs Type 3 permits.

required for a site development plan application and indicating the land use application fees. Before the hearing examiner there was evidence that City officials had advised Abbey Road orally and in writing that site development review would not vest rights in the existing commercial zoning. Thereafter, Abbey Road embarked on the development process, expending more than $96,500 in the process.[4] On September 13, 2005, it submitted a site plan application, which is part of a preliminary stage in the development process relative to the building permit application phase. Later that same day, the City passed an ordinance rezoning the subject property to Residential/Conservation District, a zoning category precluding Abbey Road's multifamily development.

In an October 12, 2005, letter, the City Planning Director notified Abbey Road that its project had not vested under the prior ordinance because Abbey Road had not filed a building permit application and that its site plan application had been denied. Abbey Road appealed the director's determination to the hearing examiner. The hearing examiner found the director correctly determined that pursuant to

[4] This amount is from the hearing examiner's findings. The record reflects other amounts. Abbey Road did not dispute this particular finding or the hearing examiner's finding that Abbey Road's expenditures amounted to only approximately .007% of the anticipated project cost. Clerk's Papers (CP) at 12.

Erickson & Associates, Inc. v. McLerran, 123 Wn.2d 864, 872 P.2d 1090 (1994), an applicant must submit a completed application for a building permit to vest the project. Abbey Road filed a petition under the Land Use Petition Act (LUPA), ch. 36.70C RCW challenging the hearing examiner's determination. The superior court reversed the hearing examiner's decision. That court concluded Abbey Road's development rights vested on September 13, 2005, when it filed a complete site plan application.

The Court of Appeals reversed the superior court and affirmed the hearing examiner's determination that Abbey Road's development rights did not vest absent a building permit application, as required under RCW 19.27.095(1). Further, the Court of Appeals declined to expand the vested rights doctrine under common law principles to recognize vesting upon the filing of a site plan application. The court also concluded that the City's process was not unduly burdensome such that it unconstitutionally frustrates vesting rights, and that its vesting process complied with common law and statutory vesting rights.[5] Abbey Road petitioned this court, and we accepted review.[6]

[5] *Abbey Road Group, LLC v. City of Bonney Lake*, 141 Wn. App. 184, 167 P.3d 1213 (2007).
[6] *Abbey Road Group, LLC v. City of Bonney Lake*, 163 Wn.2d 1045, 187 P.3d 750 (2008).

Issue

Whether in these circumstances the filing of a site plan application vested Abbey Road's development rights?

Analysis

A. Standard of Review

Judicial review of land use decisions proceeds under LUPA. The court may grant relief under LUPA only if the party seeking relief has carried the burden of establishing that one of the following standards is met:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). On appeal, Abbey Road challenged the hearing examiner's decision under (b), (c), (d), and (f), asserting it was an erroneous interpretation of the law, a clearly erroneous application of the law to the facts, and not supported by substantial evidence, and it violated Abbey Road's constitutional rights.

Standards (a), (b), (e), and (f) present questions of law, which we review de novo. Standard (c) concerns a factual determination that we review for substantial evidence. Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted. Our deferential review requires us to consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. Moreover, we give due deference to the local authority's construction of the law within its expertise. RCW 36.70C.130(1)(b). Standard (d) requires us to employ the clearly erroneous standard of review. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

B. Background: Vested Rights Doctrine

Our vesting doctrine grew out of case law recognizing that vesting rights is

rooted in notions of fundamental fairness. This doctrine reflects the recognition that development rights can represent a valuable and protectable property interest. *Erickson*, 123 Wn.2d at 870.

Washington's vested rights doctrine, as it was originally judicially recognized, entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations. *Hull v. Hunt,* 53 Wn.2d 125, 130, 331 P.2d 856 (1958).

Washington's rule is the minority rule, and it offers more protection of development rights than the rule generally applied in other jurisdictions. The majority rule provides that development is not immune from subsequently adopted regulations until a building permit has been obtained *and* substantial development has occurred in reliance on the permit. Our cases rejected this reliance-based rule, instead embracing a vesting principle which places greater emphasis on certainty and predictability in land use regulations. By promoting a date certain vesting point, our doctrine ensures that "new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under

the law." *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987). Our vested rights cases thus recognize a "date certain" standard that satisfies due process requirements.

In 1987, the legislature codified these judicially recognized principles in RCW 19.27.095(1). Laws of 1987, ch. 104, § 1. RCW 19.27.095(1) reads:

> A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

The goal of the statute is to strike a balance between the public's interest in controlling development and the developers' interest in being able to plan their conduct with reasonable certainty. Development interests can often come at a cost to public interest. The practical effect of recognizing a vested right is to potentially sanction a new nonconforming use. "A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws." *Erickson*, 123 Wn.2d at 873-74. If a vested right is too easily granted, the public interest could be subverted. *Erickson*, 123 Wn.2d at 874.

C. Application of Doctrine

We have previously resolved many of the arguments in this case in *Erickson*, which involved a challenge to the constitutionality of a Seattle ordinance setting the vesting date either when a building permit application is filed or a master use permit (MUP) is issued.[7] The reasoning and the holding in *Erickson* largely control our decision here. In *Erickson*, the developer argued both that the ordinance was unconstitutional and that the vesting doctrine should be expanded. In rejecting this argument, we affirmed the statutory line by upholding the constitutionality of the ordinance and reasoning that under the ordinance, a developer could control vesting of a MUP application and, in all instances, vesting occurs no later than the statutorily prescribed building permit application stage or earlier under the ordinance when a MUP application is approved. We explicitly rejected Erickson's invitation to expand the vesting doctrine to the filing of a MUP application based on the developer's arguments that the burden or cost of submitting the application was sufficient to support a vesting of development rights at the time of the filing of the application. We confirmed that in the absence of a local vesting ordinance

[7] The parties generally proceed as if MUP applications and site plan review applications are substantially the same, though Abbey Road indicates there may be some difference between the processes in terms of when a developer incurs the cost associated with each application. Report of Proceedings (RP) at 13.

specifying an earlier vesting date, which in *Erickson* was the date of the issuance of the MUP, then RCW 19.27.095(1) is the applicable vesting rule.

Without addressing the statute, Abbey Road argues we should reconsider and overrule our decision in *Erickson*, maintaining we wrongly decided that case by failing to properly consider the cost to a developer of submitting an MUP application. Abbey Road bases its argument for the extension of the vesting doctrine primarily on the contention that the cost to a developer of submitting a site plan application represents a level of commitment that entitles it to a vested right and is sufficient to deter permit speculation. Notably, Abbey Road raises the same cost-based arguments for the extension of the doctrine to MUP applications that we found unpersuasive in *Erickson*. *See* 123 Wn.2d at 874-75. In summary, in *Erickson*, we declined to extend the vesting doctrine to MUP applications on the basis of cost for three reasons: (1) the cost of obtaining MUP applications varies greatly depending on the proposed project; (2) we refused to reintroduce a form of case-by-case analysis of costs and reliance interests, which we had rejected 40 years before in favor of a date certain vesting standard; and (3) unlike building permit applications, MUP applications may be submitted at the infancy of a project before

the developer has made a substantial commitment to it. *Erickson*, 123 Wn.2d at 874-75. Similarly, the costs involved in preparing and submitting a building permit application are often substantial. For the same reasons we rejected the invitation to extend the vesting doctrine in *Erickson*, we refuse to expand it in this case.[8]

In analyzing the vesting rules, the Court of Appeals in this case focused on *Erickson* and, in part, on the statute codifying the common law vesting doctrine. In upholding the hearing examiner's interpretation and application of the law, that court stated, "RCW 19.27.095(1) is unequivocal and requires a 'valid and fully complete building permit application' be submitted for development rights to vest 'on the date of the application.'" *Abbey Road*, 141 Wn. App. at 194. As the Court of Appeals recognized, it is undisputed that Abbey Road did not file a building permit application. Further, Abbey Road points to no authority, either in its briefing to lower courts or to this court, allowing us to simply ignore the legislative directive

[8] Abbey Road also argues that we should expand the vested rights doctrine based on case law, contending that there is no "rational reason" for refusing to expand the doctrine to site plan applications when the courts have done so in other contexts. Pet'rs' Reply to Resp. to Suppl. Br. at 3. *See Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973) (grading permit applications); *Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974) (shoreline permit applications); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977) (septic tank permit application); *Beach v. Bd. of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968) (conditional use permit applications); *Weyerhaeuser v. Pierce County,* 95 Wn. App. 883, 976 P.2d 1279 (1999) (conditional use permit applications). Again, in *Erickson*, we considered and rejected similar arguments, and we are not persuaded to overrule our analysis or holding in *Erickson*.

set out in RCW 19.27.095(1).

Instead of discussing the relevance of this statutory directive to its case, Abbey Road's briefing presents the argument that *Victoria Tower P'ship v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987) conflicts with *Erickson* and should control the outcome of this case. Abbey Road argues that *Victoria Tower* expanded the vested rights doctrine to include the filing of a site plan application. It reasons that *Victoria Tower* stands for the proposition that the filing of an MUP application vests development rights and that the same should hold true for a site development plan. But as the Court of Appeals properly noted,"[E]ither the *Victoria Tower* courts assumed that the two types of permits were equivalent or the distinction between a[n] MUP and a building permit was not before those courts." *Abbey Road*, 141 Wn. App. at 195 (citing *Erickson*, 69 Wn. App. at 568). As such, the Court of Appeals correctly recognized that Abbey Road wrongly reads *Victoria Tower*. *Victoria Tower* did not change the long established requirement that, in order to preserve development rights, a building permit application must be filed. Even if *Victoria Tower* can be read to expand the common law vesting doctrine to MUP applications, it has been superseded by RCW 19.27.095(1) and our analysis in

Erickson.

D. Expansion of Doctrine To Protect Individual Due Process Rights

Abbey Road also argues we should expand the vesting doctrine to site plan applications in this case to protect its due process rights because the City's vesting process necessarily delays and frustrates vesting for large projects such that it is "unduly oppressive" under *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986). Abbey Road contends the hearing examiner erroneously concluded that *West Main* was inapposite and that Bonney Lake's process did not frustrate vesting. According to Abbey Road, the hearing examiner incorrectly found it had the ability to fix the vesting date by submitting a building permit application at any time during the site plan review process and that the City processes site plan development permit applications and building permit applications concurrently. Resp't's Br. at 27-28.

In *West Main,* a developer challenged the validity of a Bellevue vesting ordinance which prohibited the filing of a building permit application until after a series of procedures was complete, including procedures such as administrative design review approval, site plan review approval, administrative conditional use

approval, and modification of landscape approval. The ordinance also provided that development rights would vest only as of the time a building application was filed. This court held the Bellevue ordinance unconstitutional because the City denied the developer the ability to vest rights by filing for a building permit application until after a series of preliminary permits was obtained. The court concluded this amount of discretion subverted the vesting doctrine's underlying purpose, which is to protect a citizen's right to develop property free of the "fluctuating policy" of legislative bodies. 106 Wn.2d at 52-53. The problem with this argument is that Abbey Road has not identified any similar ordinances in the BLMC.

Nonetheless, Abbey Road argues that the City's application *process* is unconstitutional under *West Main*, and it relies primarily on its interpretation of the City's building permit application form. Abbey Road argues that the City's procedures, as evidenced by its building permit application form, "[r]equir[e] approved site development plans for a complete commercial building permit application. . . ." Resp't's Br. at 37. Abbey Road asserts it should be able to rely on the accuracy of the application form, and conditioning submission of the building permit application on prior approval of the site permit application is prohibited

under *West Main*. Resp't's Br. at 37, 40.

In response, the City contends that Abbey Road misinterprets the form, that nothing in the BLMC prevents a developer from submitting a building permit application before a site development application is approved, and that separate submission and approval for each type application is a voluntary process. According to the City, a developer can submit the site plan application and wait for the City to approve it before submitting a building permit application, or a developer can submit both applications to the City for concurrent review. If a developer chooses to do the latter, the concurrent submission will vest development rights, so long as a complete building permit application has been filed.

The City's building permit application form contains a checklist delineating items that may be included as part of the building permit application. Above the checklist, the form states, "Commercial Building Permit[:] [m]ust be submitted with the following." Beside each item on the list that follows, there are two boxes; one, when checked, establishes that the item has been "submitted," and the other denotes the item is not applicable (N/A). One of the items on that list is "Six Copies of the Approved Site Development Plans." AR Ex. 28.

After hearing the testimony of Abbey Road representatives, including Gil Hulsmann and city officials, the hearing examiner found "not all documents listed on page 2 need be submitted for a completed application," because "the form contains a block for 'N/A' which means 'not applicable'". Clerk's Papers (CP) at 35. He further found that the City's past practices in at least two projects provide evidence confirming the City does not require prior approval of a site plan permit application before it allows a developer to apply for a building permit application. Specifically, the hearing examiner found:

> Mr. Hulsmann also served as agent for Abbey Road Group, LLC, in the Windermere Real Estate office project and submitted a building construction permit application packet on March 12, 2004, prior to receiving Type 3 permit approval. . . . Thus, contrary to his testimony, in one of Mr. Hulsmann's own projects, he submitted a building permit application well in advance of receiving Type 3 approval.

CP at 35-36. In addition, the hearing examiner found:

> [I]n the Kitsap Bank project the applicant submitted a "Commercial or 'Multi-Family Site Plan Review Application Form" on January 19, 2004. . . . The applicant also submitted a Commercial Building Permit Application on January 20, 2004, one day after submitting the Type 3 permit application. . . . The City issued the Type 3 approval on August 28, 2004, . . . and apparently was prepared to issue the building permit on August 19, 2004.

CP at 36. Based on the testimony and the exhibits, the hearing examiner concluded:

> [T]he Type 3 process does not prohibit an applicant from filing a building permit application prior to completion of the process. To the contrary, the intent of the [BLMC] is to streamline and combine reviews for various permits and guide development in the City. The [BLMC] encourages concurrent review of building permit applications and Type 3 applications.

CP at 37-38.

Abbey Road responds by arguing that the "N/A" boxes appear next to each item on the checklist making it more likely that the submission of each item on the list may not be required in every instance. For example, a site development plan may not be required to obtain a building permit for the remodel of an existing building. Abbey Road argues this is a hurdle similar to that found unconstitutional in *West Main*. But in *West Main* an ordinance prevented developers from filing a building permit application before other requirements were met.

Here, we have no ordinance or regulation precluding Abbey Road from simultaneously filing a site plan and a building permit application. Instead, the City claims to allow an integrated permitting process. It was Abbey Road that chose not to use this process, but to obtain site development plan approval before undertaking

the additional step of filing a building permit application. While this may make good business sense, as building plans may change significantly depending on the final site plan approval, by the same token it suggests a builder that is not ready to proceed, and thus is not entitled to vesting under the very rationale of that doctrine. *See* Roger D. Wynne, *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 Seattle U. L. Rev. 851, 928-29 (2001) (noting the developer may want to hedge its bets by seeking one permit at a time but does so at its own risk). But unlike the facts in *West Main*, the City here provided a process that allowed a builder the ability to control the date of vesting. Abbey Road's failure to seek a building permit prevents it from establishing that Bonney Lake would have refused the simultaneous filing or that it would have deemed the building permit application incomplete without a previously approved site plan.

The dissent insists that Abbey Road could not have filed a *complete* building permit application to allow it to vest, and thus the integrated process contemplated by Bonney Lake was no more acceptable than the Bellevue ordinance we declared unconstitutional in *West Main*. But the dissent misunderstands the vesting scheme

under RCW 19.27.095. The statute leaves to the local authority the determination of when a building permit application is "fully complete[]." RCW 19.27.095(2). While there are certain minimum requirements for projects over $5,000, there is no contention these are at issue in this case, and even as to these requirements, the statute provides that an application submitted before this information is available will be deemed fully complete for vesting purposes so long as the applicant provides the required information as soon as it can reasonably be obtained. RCW 19.27.095(5). Here, as the hearing examiner determined, Bonney Lake accepted building permit applications during the pendency of site development plan review, and Abbey Road could have submitted a "complete" building permit application without awaiting approval of the site development plan.

Nothing in the statute or the record in this case supports the dissent's contention that a building permit application cannot be deemed "complete" until an applicant who is denied a permit would be entitled to demand its issuance by bringing a writ of mandamus. This conclusion rests on a premise we have rejected, specifically a false dichotomy between ministerial and discretionary acts in the context of vesting rights under a building permit. *See Norco Constr., Inc. v. King*

County, 97 Wn.2d 680, 684, 649 P.2d 103 (1982) ("The distinction between ministerial and discretionary acts is not relevant to the validity of procedural limits placed on the decisionmaking entity. The need for a 'date certain' upon which a right vests is to avoid tactical maneuvering between parties and that need would appear equally strong whether the act is discretionary or ministerial.") While some early vesting cases arose in the context of a mandamus action, it is broadly recognized that most land use decisions today involve at least some measure of discretion and are not subject to a writ of mandamus. *See* Richard L. Settle, Washington Land Use and Environmental Law and Practice § 8.4(a) (1983). Moreover, the mandamus cases provide no support for the dissent's conclusion that a developer's rights vest upon application for a site plan review permit because the "date certain" established in the mandamus cases is the date the developer applies for a building permit. *See State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 495-96, 275 P.2d 899 (1954) ("The right accrues at the time an application for a building permit is made."; *Hull*, 53 Wn.2d at 130 ("[T]he right vests when the party . . . applies for his building permit, if that permit is thereafter issued."). Nor is there any suggestion that a local authority lacks the discretion to deny site plan approval

(and all subsequent permits necessary for development) once a complete site plan review permit application is filed, so that the mandamus rationale would support vesting at this early stage.

In the final analysis, nothing in the City's municipal code or in its application procedures conditions the submission of a complete building permit application on prior approval of a site permit plan application. Abbey Road's own erroneous interpretation of the building permit application form is not a basis for finding the City's vesting procedures unconstitutional under the *West Main* standard. Abbey Road elected to proceed by obtaining site plan approval before applying for a building permit and cannot argue that its interpretation of the process it chose makes that process unconstitutional.

Although Abbey Road also argues that its case is analogous to *West Main* in part because it would have to file 24 building permit applications, its analogy fails. The number of requisite separate building permit applications is a function of the size of the project and does not make the process unduly oppressive. Here, the fact that Abbey Road has chosen to construct a 575-unit condominium project with 24 buildings is not a basis for altering the vesting doctrine. Abbey Road argues that the

size or complexity of a project should determine the vesting date. If we accept its proposed rule, then the larger the development project is the more generous the vesting would be. We reject such a rule. Whether a planned development will have a single building or multiple buildings, in the absence of a local vesting ordinance, RCW 19.27.095(1) establishes the "date certain" standard for vesting regardless of the project size. It is the filing date of a building permit application. We conclude that, under *Erickson*, Abbey Road's arguments do not support a change in the vesting doctrine.

Finally, Abbey Road argues that as a matter of fundamental fairness this court should expand the vesting rights doctrine to all land use applications. They maintain that we should do so to harmonize a haphazard common law vesting doctrine, provide certainty to developers, protect developers' expectations against fluctuating land use policies, and update a doctrine that has failed to keep pace with increasingly complex changes in land development processes. To establish this fairness and certainty in the development process, Abbey Road urges this court to establish a uniform vesting point "for every land use permit application regardless of the permit's name or what it does or does not do." Pet'rs' Reply to Resp. to Suppl.

Br. at 3-5. We find that such a rule would eviscerate the balance struck in the vesting statute. While some of Abbey Road's arguments could support a change in the law, instituting such broad reforms in land use law is a job better suited to the legislature. *See* Wynne, *supra*, at 916-17 ("[r]eform [of the vesting rights doctrine] should not be left to the judiciary, which must focus on one narrow fact pattern at a time"; advocating legislative reform).

We affirm the Court of Appeals.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:
Justice Susan Owens

Justice Debra L. Stephens